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No. 89-1701

IN THE
Supreme Court of the United States
OCTOBER TERM, 1989

RONALD MASTERS,
Petitioner,

v.

DANIEL INTERNATIONAL CORPORATION,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Should this Court grant certiorari to determine whether petitioner's state law claim is pre-empted, when prevailing authority shows that the state would not recognize petitioner's claim?

2. When a civil quality inspector employed in constructing a nuclear power plant alleges he was discharged in violation of state public policy for reporting nuclear safety violations to the NRC, is his state claim pre-empted by § 210 of the Energy Reorganization Act?

3. Do the specific remedies in the Energy Reorganization Act pre-empt general remedies under the common law?

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STATEMENT OF THE CASE

As the construction of the Wolf Creek Nuclear Generating Station was drawing to a close, Masters, a civil quality inspector, received a notice of reduction of force, informing him that his employment with Daniel International Corporation [1] (Daniel) at the Wolf Creek project

[1] Daniel International Corporation is owned by Fluor Corporation, and has the following subsidiaries which are not wholly owned: Daniel Engineering, Inc.; Daniel Navarra, S.A.; and Materiales y Equipos Auxiliares para la Construccion, S.A.

would end in three weeks. Before he left the Kansas project, he obtained other employment at a nuclear power construction project in Clinton, Illinois. A year later, when he was no longer employed by the second employer, he filed suit against Daniel in Illinois alleging common law retaliatory discharge, intentional infliction of emotional distress, and a civil rights claim. The Illinois court summarily dismissed the civil rights claim for lack of state involvement, and transferred the remaining claims to the District of Kansas. The defendant moved to dismiss the remaining claims for failure to state a claim under Kansas law and because they were pre-empted by the whistleblower provisions of the Energy Reorganization Act, 42 U.S.C. § 5851.

The District Court ruled that Kansas would not recognize an additional public policy exception to the doctrine of employment at will for a plaintiff who has another remedy. App. at 21. The court ruled that the remedy provided by 42 U.S.C. § 5851 was adequate, and dismissed the claim for retaliatory discharge in violation of public policy. App. 22-26. As part I. of this Brief will show, the Kansas Supreme Court, four days later, also ruled that § 5851 provides a "substantial and effective remedy." The Tenth Circuit has since ruled that when a plaintiff has another adequate remedy, Kansas will not recognize a new public policy exception to the doctrine of employment at will.

The District Court also ruled that petitioner had failed to state a claim for intentional infliction of emotional distress. Petitioner moved to alter or amend the judgment and submitted five supplemental motions spanning several months. These motions related to his retaliatory discharge claim, but not to his claim of intentional infliction of emotional distress. In responding to the motions to alter or amend, the court ruled, as an alternative basis for the dismissal, that the wrongful discharge claim was preempted by the whistleblower provisions of the Energy Reorganization Act.

Eventually, the District Court allowed the dismissal to be without prejudice to his right to proceed under a separate action he had filed in another division of the District of Kansas, arising out of these same facts, which alleges claims under RICO and the Kansas law of civil conspiracy. The second action is pending in the District Court.

Masters appealed the dismissal of the retaliatory discharge claim. The Tenth Circuit affirmed the dismissal on the basis of pre-emption. *Masters v. Daniel International Corporation*, 895 F.2d 1295 (10th Cir. 1990). Because of its holding on the pre-emption issue, the Tenth Circuit did not reach the question of whether Masters had stated a valid claim for retaliatory discharge in violation of the public policy of Kansas.

The petitioner argues that the Tenth Circuit's holding is unconstitutionally overbroad. When he appealed to the Tenth Circuit, petitioner stated the issue, "Is a nuclear civil quality control inspector's state common law claim for retaliatory discharge against his employer preempted by 42 U.S.C. § 5851?" The Tenth Circuit's holding is that "42 U.S.C. § 5851 preempts any state law claim for wrongful termination for reporting safety violations under the Act." The respondent sees no significant difference between the petitioner's statement of the issue and the Tenth Circuit's holding. Retaliatory discharge under the Act seems to be the same as wrongful termination for reporting safety violations under the Act. The Tenth Circuit decided the issue presented, and its holding is correct. The Act pre-empts any state law claim within its bounds.

Petitioner relies extensively on this Court's granting the petition for writ of certiorari in *English v. General Electric Company*, 871 F.2d 22 (4th Cir. 1989), *cert. granted*, 493 U.S. ——, 110 S.Ct. 862, 107 L.Ed.2d 946 (1990), and asserts, "The facts in *English* are similar to the present case; moreover, the question for review is the same." Petition, Page 18.

This is simply not accurate. Granting the petition in *English* does not warrant granting the petition here. Petitioner's "Question Presented" presumes that Masters has a valid state common law claim for retaliatory discharge in violation of public policy. This is a fatal flaw in his petition.

Although both English and Masters initially filed suit alleging retaliatory discharge and emotional distress claims, the District Court in *English* found that she had stated a valid claim for intentional infliction of emotional distress, and she abandoned her retaliatory discharge claim. The District Court in *Masters* however, ruled he had not stated a valid claim under state law for retaliatory discharge or intentional infliction of emotional distress. In contrast to *English*, Masters abandoned his claim for intentional infliction of emotional distress and pursued his claim for retaliatory discharge. As part I. of this Brief will show, the District Court was correct in its determination that Masters had not stated a valid claim for retaliatory discharge in violation of public policy under Kansas law. Thus, even if this Court should rule that Masters' claim is not pre-empted, he would still have no claim under Kansas law. Moreover, Respondent objects to any attempts to "incorporate" any arguments from *English* to this action.

SUMMARY OF ARGUMENT

Kansas would not recognize a claim for retaliatory discharge in violation of public policy for petitioner's circumstances. The District Court in this action, and the Court of Appeals for the Tenth Circuit in *Polson v. Davis*, 895 F.2d 705 (10th Cir. 1990), both ruled that Kansas would not recognize a claim for retaliatory discharge if the plaintiff had another adequate remedy. The Kansas Supreme Court has ruled that the Whistleblower Act provides a "substantial and effective" remedy. *Chrisman v. Philips Industries, Inc.*, 242 Kan. 772, 751 P.2d 140, 3

I.E.R. Cases 181 (1988). Thus, petitioner has failed to state a valid claim under Kansas law; he has no claim to pre-empt.

Congress has committed the regulation of safety aspects of nuclear power to the Nuclear Regulatory Commission. The whistleblower provisions are in the nuclear safety section of the Act, and whistleblowers perform an important safety function in the nuclear industry.

> State safety regulation is not pre-empted only when it conflicts with federal law. Rather, the Federal Government has occupied the entire field of nuclear safety concerns, except the limited powers expressly ceded to the states. When the Federal Government completely occupies a given field or an identifiable portion of it, as it has done here, the test of pre-emption is whether "the matter on which the State asserts the right to act is in any way regulated by the Federal Act."

Pacific Gas & Electric v. State Energy Resources Commission, 461 U.S. 190, 212-13, 103 S.Ct. 1713, 75 L.Ed.2d 752 (1983), *quoting Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 236, 67 S.Ct. 1146, 91 L.Ed. 1447 (1947). A claim of retaliatory discharge for nuclear whistleblowing *is* "regulated by the Federal Act", and the state claim is therefore pre-empted.

A specific statutory remedy pre-empts a more general remedy. This Court has "consistently held that a narrowly tailored employee compensation scheme pre-empts the more general tort recovery statutes." *Brown v. General Services Administration*, 425 U.S. 820, 96 S.Ct. 1961, 48 L.Ed.2d 402 (1976). The Whistleblower Act is a new, comprehensive and balanced statutory remedy directed specifically at protecting nuclear whistleblowers; it therefore pre-empts a more general remedy under the common law.

Petitioner has no claim under the law of Kansas, the Tenth Circuit properly ruled that the Whistleblower Act

governs nuclear safety and pre-empts the field, and the specific remedy under § 210 pre-empts the general remedy under the common law. Therefore, this Court should not grant the petition.

ARGUMENT

I. KANSAS WOULD NOT RECOGNIZE PETITIONER'S CLAIM

In developing the Kansas law of retaliatory discharge, the Kansas Supreme Court has indicated, but not explicitly ruled, that if a discharged employee had another adequate remedy, Kansas would not recognize an additional public policy execption to the doctrine of employment at will.

On February 6, 1990, the same day that the Tenth Circuit issued the decision below, a different panel of the Tenth Circuit issued *Polson v. Davis*, 895 F.2d 795 (10th Cir. 1990). In *Polson*, the panel unanimously ruled that the Supreme Court of Kansas would *not* allow a common law cause of action for wrongful discharge in violation of public policy to an employee who had a valid cause of action under the Kansas Acts Against Discrimination, K.S.A. § 44-1001, *et seq.* (KAAD). 895 F.2d at 709. The Tenth Circuit ruled "that plaintiff's remedies under Kansas statutory law preclude a recovery under the tort of wrongful discharge." 895 F.2d at 709. The court ruled that it must analyze the adequacy of the remedy, but rejected the theory that a mere difference in remedies was a sufficient basis for the court to recognize a new cause of action.

After analysis of the state court precedents, the Court of Appeals concluded: "Faced with the need to decide, we believe, as did the district court, that the Kansas Supreme Court would adopt the view that KAAD provides an adequate and exclusive state remedy for violations of

the public policy enunciated therein." 895 F.2d at 709. This ruling is similar to the cases of this Court, discussed in part III., which hold that if a statute provides a specific remedy, a cause of action under the general law is pre-empted.

When this Court was faced with ruling on a question of state law decided by a District Court, and affirmed by an evenly divided circuit court, this Court ruled, "In comparable circumstances, this Court has accepted the interpretation of state law in which the District Court and the Court of Appeals have concurred even if an examination of the state-law issue without such guidance might have justified a different conclusion." *Bishop v. Wood*, 426 U.S. 341, 346, 96 S.Ct. 2074, 48 L.Ed.2d 684 (1984). In a footnote this Court explained,

> "In dealing with issues of state law that enter into judgments of federal courts, we are hesitant to overrule decisions by federal courts skilled in the law of particular states unless their conclusions are shown to be unreasonable." [quoting *Proper v. Clark*, 337 U.S. 472, 486-487, 69 S.Ct. 1333, 93 L.Ed. 1480 (1949)] . . . "On such questions we pay great deference to the views of the judges of those courts 'who are familiar with the intricacies and trends of local law and practice.' [*quoting Township of Hillsborough v. Cromwell*, 326 U.S. 620, 629-630, 66 S.Ct. 445, 90 L.Ed. 358 (1946), *quoting Huddleston v. Dwyer*, 322 U.S. 232, 237, 64 S.Ct. 1015, 88 L.Ed. 1246 (1944).]

426 U.S. at 346, n.10.

Four days after the District Court dismissed petitioner's claim for a final time, the Kansas Supreme Court ruled, like the District Court and the Tenth Circuit in this action, that a nuclear whistleblower's claim of retaliatory discharge in violation of the public policy of Kansas is pre-empted by the Whistleblower Act. *Chrisman v. Philips Industries, Inc.*, 242 Kan. 772, 751 P.2d 140, 3 I.E.R. Cases 181 (1988). In *Chrisman*, the Su-

preme Court of Kansas, discussed the remedy afforded by § 5851:

> Section 5851 not only provides a *substantial and effective remedy* for an employee who contends he has been discharged because of "whistle-blowing," but it also provides the Federal Nuclear Regulatory Agency with invaluable information from those working in the field who are most likely to discern the problems relating to the public safety in the nuclear field. We hold that 42 U.S.C. § 5851 is primarily a safety regulation, and that Congress has pre-empted the field. *We need not determine* whether termination of an employee for "whistle-blowing" in nuclear and related industries violates state public policy or whether a further exception to the employment-at-will doctrine should be created. Congress has provided the exception by legislation, which we hold pre-empts the field (emphasis added).

3 I.E.R. Cases 185.

Based on this discussion, even if the state claim were not pre-empted, the Supreme Court of Kansas would not recognize a claim of retaliatory discharge for a nuclear whistleblower. Contrary to petitioner's suggestion, Kansas has *not* recognized a claim for his allegations. Nothing has called into question the District Court's opinion that Masters failed to state a claim for retaliatory discharge in violation of public policy under Kansas law. In fact the Tenth Circuit's decision in *Polson* and the Kansas Supreme Court's decision in *Chrisman* have bolstered the District Court's conclusion.

In this action, this Court should "pay great deference to the views" of the Senior U.S. District Judge, who ruled that plaintiff had not stated a valid claim under the law of Kansas, and to the unanimous panel of the Tenth Circuit in *Polson v. Davis*, which ruled that Kansas courts would not recognize a new public policy exception to the doctrine of employment at will when a plaintiff had an adequate remedy under a statute. If the state statute, KAAD, preempts a more general common law

claim for retaliatory discharge, then certainly the specific federal statute, the Whistleblower Act, preempts a state common law claim.

Unlike the plaintiff in *English*, Masters has *not* established a valid claim under state law.

II. THE WHISTLEBLOWER ACT PRE-EMPTS PETITIONER'S CLAIM

A. The NRC Has Exclusive Authority Over Radiological Safety

Congress has reserved to the Nuclear Regulatory Commission the "authority and responsibility with respect to regulation of—(1) the construction and operation of any production or utilization facility." 42 U.S.C. § 2021(c).

In *Pacific Gas & Electric v. State Energy Resources Commission*, this Court made an extensive review of the legislative history of the Energy Reorganization Act. The Court ruled,

> Congress, in passing the 1954 Act and in subsequently amending it, intended that the Federal Government should regulate the radiological safety aspects involved in the construction and operation of a nuclear plant, but that the States retain their traditional responsibility in the field of regulating electrical utilities for determining questions of need, reliability, cost, and other related State concerns.

461 U.S. at 205. Justices Blackmun and Stephens, concurring in part and concurring in the judgment, viewed the issue slightly differently, but nevertheless wrote, "Congress has occupied not the broad field of 'nuclear safety concerns,' but only the narrower area of how a nuclear plant should be constructed and operated to protect against radiation hazards." 461 U.S. at 224. Thus, all the justices agreed that Congress intended the Nuclear Regulatory Commission to govern the construction and operation of a nuclear power plant, to protect against safety hazards.

Masters bases much of his argument in the petition on *Silkwood v. Kerr-McGee Corporation*, 464 U.S. 238, 104 S.Ct. 615, 78 L.Ed.2d 443 (1984), in which this Court ruled, 5-4, that Congress did not intend to pre-empt state law claims for radiation injuries suffered from nuclear accidents. The Court found Congressional intent for this ruling in the Price-Anderson Act which contemplated insurance for state law claims based on radiation leaks, and the implicit assumption that such claims would be available, despite the authority of the Nuclear Regulatory Commission. In addition to the Price-Anderson Act, the Court also based its decision on the fact that Congress had failed to provide any federal remedy for persons injured by radiation leaks.

In contrast to the facts of *Silkwood*, Congress has provided nuclear whistleblowers an explicit remedy under the Whistleblower Act. Furthermore, there is no corollary to the Price-Anderson Act in the realm of nuclear whistleblowers, which explicitly assumes the availability of state law remedies. In *Silkwood* the Court ruled, in effect, that the federal government had not so completely occupied the field of recovery for radiation damages, as it had the field of construction and operation of nuclear power plants. The four dissenting justices in *Silkwood* were of the opinion that the award of punitive damages was a regulatory function which properly belonged to the NRC.

Most recently this Court considered the issue of field pre-emption in the *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 108 S.Ct. 1145, 99 L.Ed.2d 316 (1988). The Court ruled 8-0 that in the case of field pre-emption, when state action "presents the 'prospect of interference with the federal regulatory power,' then the state law may be pre-empted even though 'collision between the state and federal regulation may not be an inevitable consequence.' *Northern Natural Gas Co. v. State Corporation Comm'n of Kansas*, 372 U.S. [84] at 91-92, 83

S.Ct. 646, 9 L.Ed.2d 601 (1963)." 485 U.S. at 310. In this action, there is not only the "prospect of interference;" interference is *inevitable.*

B. The Whistleblower Act Promotes Nuclear Safety

In enacting the Whistleblower Act, 42 U.S.C. § 5851, Congress granted protection to whistleblowers involved in the construction or operation of a federally-licensed nuclear power facility. The Act applies to "a Commission licensee, an applicant for a Commission license, or a contractor or subcontractor of a Commission licensee or applicant." § 5851(a). A whistleblower must be employed in the construction or operation of a nuclear power facility, to have a claim under the Whistleblower Act. The Whistleblower Act is therefore a part of the federally pre-empted field of the construction and operation of nuclear power plants.

First, the Whistleblower Act furthers nuclear safety by the short limitations period. It requires that the retaliatory discrimination be brought to the attention of the NRC or Secretary of Labor, who reports it to the NRC within 30 days, so that the safety complaint can be investigated promptly and corrected if need be. Without this requirement, a whistleblower could report the safety complaint to his employer, but not to the NRC, suffer some retaliation, file suit in state court and *never* bring the safety complaint to the attention of the NRC.

Second, the employee must be participating in a proceeding under the Act, or in an "action to carry out the *purposes* of this chapter or the Atomic Energy Act of 1954, as amended" (emphasis added). § 5851(a)(3). The Whistleblower Act is in the nuclear safety section of the Energy Reorganization Act. This limitation as to the *purpose* of the whistleblowing shows that the federal remedy which Congress provided for whistleblowers furthers the pre-empted area of radiological safety in the construction and operation of nuclear power plants, and § 5851 must be construed to pre-empt state law on the subject.

Third, § 5851(g) denies a remedy to anyone who "deliberately causes a violation of any requirement of this chapter or of the Atomic Energy Act of 1954, as amended." This strict provision shows that Congress was concerned primarily, not with recovery for employees, but with nuclear safety. This protects the employer's right to discharge anyone who deliberately violates the act without fear of a vindictive lawsuit. If state claims were allowed, the state court might not recognize this provision as a defense to a state claim, thus upsetting the balance Congress created. If the state court did recognize this defense, state court juries would decide whether the conduct was a deliberate violation of the Atomic Energy Act. This would be an impermissible intrusion into the area given exclusively to the NRC.

C. Whistleblowers Promote Nuclear Safety

Congress has recognized that whistleblowers are irretrievably involved in promoting safety. This common sense relationship between whistleblowing and safety is shown in Senate Report No. 95-181, which accompanied the Federal Mine Safety and Health Amendments Act of 1977. These amendments expanded protections first offered in Public Law 91-173 relating to the health and safety of the nation's coal miners. The legislative history of the Nuclear Whistleblower Act referred specifically to the whistleblower protections in Public Law 91-173.

> If our national mine safety and health program is to be truly effective, miners will have to play an active part in the enforcement of the Act. The Committee is cognizant that if miners are to be encouraged to be active in matters of safety and health, they must be protected against any possible discrimination which they might suffer as a result of their participation.

Senate Report No. 95-181, 1977, U.S. Code Cong. & Admin. News at 3435.

Several courts have recognized that nuclear whistleblowers are intertwined with the promotion of nuclear safety. *Kansas Gas & Electric Co. v. Brock*, 780 F.2d 1505 (10th Cir. 1985), *cert. denied*, 478 U.S. 1011, 106 S.Ct. 3311, 92 L.Ed.2d 724 (1986) was an appeal from the Secretary of Labor's decision in favor of a nuclear whistleblower. The court analyzed the relationship between quality inspectors who are whistleblowers and the Nuclear Regulatory Commission, and recognized the connection between whistleblowing and safety.

"A properly functioning licensee quality assurance program is an integral part of the NRC's regulatory program . . . . In effect, such a program serves as the eyes and ears of the NRC because the inspectors are always on site and take over much of the inspection burden from federal personnel." 780 F.2d at 1507. The court continued:

> It is clear that what is involved here is a complaint concerning employment discrimination, a matter within the competence of the Secretary [of Labor]. It is foreseeable, however, that intertwined with an employment discrimination complaint could be matters specifically concerning substantive questions of nuclear safety which are better determined by the NRC, a body with competence on nuclear issues.

780 F.2d at 1509.

Likewise, in *English v. General Electric Co.* the court stated: "As the legislative history indicates, protecting an employee's livelihood in the nuclear industry while at the same time encouraging disclosure of potential safety hazards and violations are matters inextricably intertwined." 683 F.Supp. 1006, 1013 (E.D.N.C. 1988), *aff'd*, 871 F.2d 22 (4th Cir. 1989), *cert. granted*, —— U.S. ——, 110 S.Ct. 862, 107 L.Ed.2d 946 (1990).

The Second Circuit analyzed the relationship between the quality assurance programs and the NRC in *Norman v. Niagara Mohawk Power Corporation*, 873 F.2d 634 (2nd Cir. 1989). The court noted, "Regulations adopted

by the [Nuclear Regulatory] Commission pursuant to the Energy Reorganization Act of 1974, 42 U.S.C. § 5801 et seq., require that certain quality assurance programs be adopted to ensure safety in the construction and operation of a plant such as Niagara's." 873 F.2d at 635. The appellants in that action were quality assurance auditors for Niagara, who reported safety violations in compliance with 42 U.S.C. § 5846. They alleged they were subjected to harassment and discrimination for reporting the safety violations. After they failed to recover under the administrative process, they filed suit under RICO. The District Court dismissed the claims and the Second Circuit affirmed, ruling that § 5851 provides the exclusive remedy for persons with nuclear whistleblower complaints. The court ruled, "We are not dealing here with a collateral matter that is only peripherally related to the safety concerns implicit in § 210." 873 F.2d at 637.

State courts have also recognized this relationship. "Section 5851 . . . provides the Federal Nuclear Regulatory Agency with invaluable information from those working in the field who are most likely to discern the problems relating to the public safety in the nuclear field. We hold that 42 U.S.C. § 5851 is primarily a safety regulation, and that Congress has pre-empted the field." *Chrisman v. Philips Industries, Inc.*, 242 Kan. 772, 751 P.2d 140, 3 I.E.R. Cases 181, 185 (1988). Likewise, the dissent in *Wheeler v. Caterpillar Tractor Company*, 108 Ill.2d 502, 485 N.W.2d 372 (1985), recognized that the Whistleblower Act regulates "the safety aspects of nuclear energy," which is "an area traditionally governed by federal law." 485 N.W.2d at 378.

Based on this analysis, these courts have ruled that Section 5851 pre-empts all state claims that come under its provisions. In *Kansas Gas & Electric*, the court ruled, "Section 5851 of the ERA states that exclusive jurisdiction in employment discrimination matters is vested by Congress in the Secretary of Labor." 780 F.2d at 1508.

The First Circuit, which ruled that Section 5851 did not pre-empt a claim for wrongful discharge, found that the whistleblower protections were *not* safety-related. *Norris v. Lumbermen's Mutual Casualty Company*, 881 F.2d 1144, 1150 (1st Cir. 1989). Without any analysis, the *Norris* court stated, "A state law action for wrongful discharge does not affect in any way the safety standards promulgated by the Nuclear Regulatory Commission. The issue in such a case is not the efficacy of nuclear energy safety standards, but whether the plaintiff can prove whether he was wrongfully discharged." 881 F.2d at 1150.

The Fourth Circuit provided the better analysis of this issue when it ruled that the whistleblower section of the Federal Railroad Safety Act "clearly is a law 'relating to railroad safety' under [the statute]. . . . The purpose of the Act is to reduce injuries to persons and damage to property caused by railroad accidents. [Citations omitted.] Section 441 furthers these goals by protecting railroad employees who report safety violations." *Rayner v. Smirl*, 873 F.2d 60, 65 (4th Cir.), *cert. denied*, 493 U.S. ——, 110 S.Ct. 213, 107 L.Ed.2d 166 (1989).

The *Rayner* court explained:

> In one sense, of course, all the trier of fact need do in a wrongful discharge action is determine the reason for the discharge. In another sense, however, Rayner's claim of wrongful discharge for "whistleblowing" is inextricably tied to the question of precisely what railroad safety practices he was blowing the whistle on. To the extent that the justifiable nature of the whistleblowing enters the calculus in wrongful discharge actions, railroad safety laws might be subject to an unpredictable medley of jury determinations, which Congress, in its quest for national uniformity under [45 U.S.C.] § 434 sought to avoid.

873 F.2d at 66.

States have more liberty to address safety matters under the Federal Railroad Safety Act, than under the Energy Reorganization Act. "Under section 434, states generally remain free to address matters of railroad safety until pre-empted by federal action. [Citations omitted.] Once the federal government acts, however, the FRSA normally pre-empts state regulation of that subject matter." 873 F.2d at 66. The *Rayner* court ruled that the whistleblower provisions of the Federal Railroad Safety Act pre-empted an employee's state law claims based on whistleblowing.

In contrast, the NRC has exclusive control over the radiological safety aspects of nuclear power plant construction and operation, and states have no authority to supplement it. *Pacific Gas & Electric.* If a claim for wrongful discharge for whistleblowing under the Federal Railroad Safety Act is pre-empted, certainly a claim for wrongful discharge for nuclear whistleblowing is pre-empted.

In his petition Masters makes dubious assertions that his case "does not concern regulation of the radiological safety aspects of a nuclear plant," (p. 20) and "does not necessitate invasion of the NRC's authority to regulate safety matters." (p. 22) These assertions are incredible, especially in light of his argument before the District Court that he was intimately involved in nuclear safety.

> There is no public policy more important or more fundamental than the protection of the lives and property of the people of the State of Kansas from the dangers inherent in the *unsafe construction* of a nuclear power plant . . . .
>
> It is not inconceivable that plaintiff may have helped minimize the *risk of nuclear catastrophe* at Wolf Creek and, depending on which way the wind might have blown, *radioactive fallout on this courtroom*, not to mention saving the lives of thousands

> of Kansans and preservation of the land which is the breadbasket of the world from turning into a *Chernobylesque countryside* (emphasis added).

Plaintiff's Motion to Alter or Amend the Judgment, filed May 4, 1987.

Incidentally, such inflammatory arguments point out the wisdom of Congress in choosing to commit these claims to agencies with expertise in the fields. A whistleblower claim will ultimately turn on the credibility of the whistleblower. Who decides whether a frenzied claim of an imminent nuclear holocaust is credible?

A jury, untrained in nuclear safety, could not easily disregard the threat of "radioactive fallout on this courtroom" and concentrate on the real issues in the case. The NRC, on the other hand, has trained experts who can competently investigate the charges and not be as vulnerable to pleas for astronomical damages based on hysterical visions of a "Chernobylesque countryside." Congress, for good reason, entrusted the duties of investigating the claims of nuclear whistleblowers, assessing their credibility, and evaluating questions of nuclear safety to the NRC. Congress could not have intended that the nuclear safety laws be subjected "to an unpredictable medley of jury determinations." *Rayner v. Smirl*, 873 F.2d at 66.

Congress also saw that employers need to be able to make decisions about discharging employees, especially ones who violate nuclear safety rules, without being held hostage to the threat of inflammatory arguments in vindictive law suits. Without pre-emption, discharged whistleblowers would not take their safety claims to the agencies. Like Masters, they would allow the limitations period to expire and file in state court, hoping to reap huge payoffs. Congress did not intend that the elaborate and careful blend of administrative and judicial remedies be circumvented or ignored.

III. A SPECIFIC REMEDY PRE-EMPTS GENERAL REMEDIES

In *Brown v. General Services Administration*, 425 U.S. 820, 96 S.Ct. 1961, 48 L.Ed.2d 402 (1976), this Court decided a case which is in many respects parallel to the case at bar. The Court ruled that a federal employee who had a specific remedy under Title VII of the Civil Rights Act, 42 U.S.C. § 2000e-16(c), could not bring a cause of action under the more general provisions of 42 U.S.C. § 1981. The rule applied in *Brown* was one which has been applied in a variety of circumstances before and after *Brown*. "We have consistently held that a narrowly tailored employee compensation scheme pre-empts the more general tort recovery statutes." 425 U.S. at 834-35.

In *Brown*, the petitioner had 30 days after the conclusion of his Title VII administrative proceedings to file suit in the District Court. He filed 42 days after administrative proceedings were concluded. The Supreme Court ruled that the filing was untimely. This Court also ruled that Title VII, with its carefully crafted scheme of administrative and judicial rights, was the exclusive remedy for persons coming under its provisions.

Factors supporting the Court's analysis were the following: (1) plaintiff had no clearly defined and widely accepted cause of action prior to the enactment of § 2000e-16(c) which would allow a plaintiff to seek backpay, reinstatement or other compensatory relief; (2) the law "proscribes federal employment discrimination and establishes an administrative and judicial enforcement system;" and (3) Congress did not intend that plaintiffs circumvent this remedial enforcement scheme by artful pleading. 425 U.S. at 829-833.

Since *Brown*, the Court has applied this rule in other contexts. In *Block v. North Dakota*, 461 U.S. 273, 103 S.Ct. 1811, 75 L.Ed.2d 840 (1983), the Court unanimously ruled that because Congress had enacted the Quiet Title Act, this rule of interpretation prevented the State

of North Dakota from suing federal officials under the jurisdictional grants of federal question, mandamus, and declaratory judgment. The Court based its conclusion on factors similar to those considered in *Brown*: (1) prior to the enactment of the Quiet Title Act, there was no widely recognized remedy for persons seeking to sue the United States to quiet title to land; (2) Congress enacted a system of recovery that involved limitations and compromises which were specifically directed to the issue of quieting title with the United States; (3) the protections and privileges given to the United States under the Quiet Title Act would be rendered nugatory if plaintiffs were allowed to proceed under more general acts.

The Court in *Block* relied on *Brown*'s holding that "the 'balance, completeness and structural integrity' of the statute belied the contention that it was 'designed merely to supplement other putative judicial relief.' [425 U.S.] at 832. Thus, we applied the rule that a precisely drawn, detailed statute pre-empts the more general remedies. *Id.*, at 834. That rule is equally applicable in the present context." 461 U.S. at 285. All members of the Court agreed with this holding.

In *Jett v. Dallas Independent School District*, 491 U.S. ——, 109 S.Ct. 2702, 105 L.Ed.2d 598 (1989), all members of the Court again acknowledged the rule that a more specific and detailed statute which specifically addresses the question will pre-empt a cause of action brought under a more general statute. The majority and the dissent disagreed on the application of the rule to the facts of that case, and whether Congress had initially intended to provide a private right of action against municipalities under 42 U.S.C. § 1981. No member of the Court, however, questioned the validity of the rule.

These same factors are present in the case at bar. Prior to 1978 when the Whistleblower Act was passed by Congress, employees of contractors, licensees and applicants for licenses had no specific right granted by state or federal law to bring a civil action for retaliatory dis-

charge for whistleblowing. The accepted rule was employment at will, unless some contractual obligation such as a collective bargaining agreement altered that status, and even then, there was no cause of action in tort for retaliatory discharge. A whistleblower action, unknown at common law, is solely a creature of statute. In order to recover under the Act, the employee must be participating in a proceeding under the Energy Reorganization Act or the Atomic Energy Act, or the employee must be reporting violations of the acts.

The legislative history of § 5851 implies that prior to this statutory enactment, the right of whistleblower to recover the retaliatory discharge for whistleblowing was unknown. Senate Report No. 95-848, 1978, U.S. Code Cong. & Admin. News at 7303 states, "The section *offers protection* to employees who believe they have been fired or discriminated against as a result of the fact that they have testified, given evidence, or brought suit under that act or the Atomic Energy Act" (emphasis added).

The report continued, "Under this section, employees and union officials could help assure that employers do not violate requirements of the Atomic Energy Act. . . . The section *would prohibit* any firing or discrimination and *would provide* an administrative procedure under which the employee or his representative could seek redress for any violation of this prohibition" (emphasis added). *Id.* at 7304.

The House Conference Report No. 95-1796, the joint explanatory statement of the Committee on Conference, also indicates that this was a new protection for the employees. "The Senate bill amended the Energy Reorganization Act of 1974 *to provide protection* to employees of Commission licensees, applicants, contractors, or subcontractors from discharge or discrimination for taking part or assisting in administrative or legal proceedings of the Commission" (emphasis added). *Id.* at 7309. Congress believed that prior to this enactment, the nuclear whistleblower had no right to reinstatement, backpay, or other relief. The cause of action was simply unknown.

The second factor in *Brown* and *Block v. North Dakota* is the comprehensive remedial scheme. Congress set up a comprehensive blend of administrative and judicial procedures to enforce these protections for whistleblowers. Like the statute in *Brown*, the Whistleblower Act proscribes the offensive conduct and "establishes an administrative and judicial enforcement system." 425 U.S. at 829. The legislative history summarizes the comprehensive remedial scheme. "The Secretary of Labor would investigate such charges and issue findings and a decision which would be subject to judicial review. If the Secretary should find a violation, he would issue orders to abate it, including, where appropriate, the rehiring of the employee to his former position with backpay. Also, the person committing the violation could be assessed the costs incurred by the employee to obtain redress." Senate Report 95-848, 1978, U.S. Code Cong. & Admin. News at 7304.

The third factor considered in the analysis of this principle is whether the allowance of extra-statutory remedies would upset the balance and compromise which Congress hammered out. In establishing the remedial scheme, Congress balanced competing interests of the employer and the employee, to further the goals of a just result for all parties and the promotion of safety in nuclear radiation. The legislative history addresses this point.

> This provision would safeguard the rights of employees, but it should not encourage employees to frivolously allege violations since the employee would have to pay the costs of the proceedings unless the violation is proved.
>
> In order to avoid abuse of the protection afforded under this section, the committee has added a provision which would deny its applicability to any employee who, without direction from his employer, deliberately violates or willfully contributes to a violation of any standard, requirement, or regulation under the Act.

Id.

The protections afforded coal miners under the Federal Coal Mine Health and Safety Act of 1969, Public Law 91-173, and expanded to include all miners, their representatives, and applicants for employment under the Federal Mine Safety and Health Amendments Act of 1977, Public Law 95-164, are similar to those granted to employees under 42 U.S.C. § 5851. The legislative history stating the purpose of those laws is significant in determining the purpose of § 5851.

In fashioning a remedy for whistleblowing miners, Congress set a short time limit for bringing the claim "to avoid stale claims being brought." Senate Report No. 95-181, 1977, U.S. Code Cong. & Admin. News at 3436. The Senate Report also states that the time limit:

> should not be construed strictly where the filing of a complaint is delayed under justifiable circumstances. Circumstances which would warrant the extension of the time limit would include a case where the miner within the 60 day period brings the complaint to the attention of another agency or to his employer, or the miner fails to meet the time limit because he is misled as to or misunderstands his rights under the Act.

Id.

Thus, the 30-day limitation period in the Energy Reorganization Act is deliberately short to avoid stale claims, yet it is not jurisdictional. It may be extended under the circumstances set out by Congress in the legislative history of the Federal Mine Safety and Health Amendments Act of 1977. Furthermore, in complying with this short limit, the employee can be restored to his prior position, with a minimum of personal hardship.

Congress balanced the competing interests in Section 5851. It protects the employee's right to blow the whistle, while it also protects the employer's right to discipline or dismiss an employee for causing a safety hazard or violating safety rules, without fear of a vindictive multimillion dollar lawsuit. It allows an aggrieved employee a speedy remedy while it protects the employer from

stale claims. It affords the employee complete remedy including make-whole relief, reinstatement, and compensatory damages and costs, while it protects the employer from punitive damages, unless the employer violates an order of the Secretary.

Just as in *Brown*, to allow a plaintiff to spurn the comprehensive, and carefully crafted remedy set up by Congress, in favor of a remedy under a more general statute in a state court action, would upset the balance which Congress struck and eviscerate the protections that Congress afforded the employer. The Court's analysis in *Brown* is equally applicable here.

> The balance, completeness, and structural integrity of § 717 are inconsistent with the petitioner's contention that the judicial remedy afforded by § 717(c) was designed merely to supplement other putative judicial relief. His view fails, in our estimation, to accord due weight to the fact that unlike these other supposed remedies, § 717 does not contemplate merely judicial relief. Rather, it provides for a careful blend of administrative and judicial enforcement powers. Under the petitioner's theory, by perverse operation of a type of Gresham's law, § 717, with its rigorous administrative exhaustion requirements and time limitations, would be driven out of currency were immediate access to the courts under other, less demanding statutes permissible. The crucial administrative role that each agency together with the Civil Service Commission was given by Congress in the eradication of employment discrimination would be eliminated "by the simple expedient of putting a different label on [the] pleadings." *Preiser v. Rodriguez*, 411 U.S. 475, 489-490, 93 S.Ct. 1827, 36 L.Ed.2d 439 (1973). It would require the suspension of disbelief to ascribe to Congress the design to allow its careful and thorough remedial scheme to be circumvented by artful pleading (footnote omitted).

425 U.S. at 832-33.

CONCLUSION

The Supreme Court of Kansas has ruled that the Whistleblower Act provides petitioner a "substantial and effective remedy," and Kansas would not recognize a new public policy exception to the doctrine of employment at will for petitioner's circumstances. There is no state claim to pre-empt.

Congress has granted to the NRC exclusive authority over the construction of nuclear power plants insofar as it relates to radiological safety. The Whistleblower Act is part of the pre-empted field. The Tenth Circuit properly ruled that petitioner's claim for retaliatory discharge for reporting nuclear safety violations is pre-empted.

Congress has drafted a carefully balanced blend of administrative and judicial remedies specifically for nuclear whistleblowers. Petitioner may not, by artful pleading, circumvent this remedial scheme, and bring a claim under the common law of Kansas.

For these reasons, this Court should deny the petition for writ of certiorari to the Tenth Circuit.

Respectfully submitted,

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